Office-Supreme Court, U.S.
FILED
FEB 12 19[illegible]
ALEXANDER L. STEVAS,
CLERK

No. 80-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR,

Appellant,

—v.—

MITE CORPORATION and MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

RICHARD W. HULBERT
One State Street Plaza
New York, New York 10004
(212) 344-0600
Counsel for Appellees

CHRISTOPHER H. LUNDING
Of Counsel

TABLE OF CONTENTS

	PAGE
ADDITIONAL STATEMENT OF FACTS	1
ADDITIONAL STATUTORY PROVISIONS INVOLVED	2
ARGUMENT	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

PAGE

Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) 6

Kennecott Corp. v. Smith, CCH Fed. Sec. L. Rep. ¶ 97,731 (3d Cir., December 17, 1980) 6

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 6

People v. Dean, 73 Ill. App. 3d 501, 392 N.E.2d 57 (1979) 4, 5

Preiser v. Newkirk, 422 U.S. 395 (1975)..... 3

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) . 6

State ex rel. Williams v. Whitman, 116 Fla. 196, 156 So. 705 (1934)..... 5

United States v. Mancuso, 139 F.2d 90 (3d Cir. 1943) .. 4

United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) 4

Wilson v. Goodin, 291 Ky. 144, 163 S.W. 2d 309 (1942) 4

Statutes

Illinois Business Take-Over Act §§ 137.63-137.65, Ill. Rev. Stat. 1979, ch. 121 1/2, §§ 137.63-137.65 3

Illinois Criminal Code of 1961 § 4-8(b), Ill. Rev. Stat. 1979, ch. 38, § 4-8(b)..... 2, 4

Model Penal Code § 2.04(3)(b), Proposed Official Draft (1962) 4

Treatises PAGE

21 C.J.S. *Courts* § 194(a) (1940) 4

Hall and Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641 (1941) 5

W.R. LaFave and A.W. Scott, Jr., Handbook on Criminal Law (1972) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR,

Appellant,

—v.—

MITE CORPORATION and MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Appellees MITE Corporation and MITE Holdings, Inc. (collectively, "MITE") respectfully move this Court to dismiss this appeal as moot or, alternatively, to summarily affirm the judgment of the United States Court of Appeals for the Seventh Circuit below on the ground that the decision below was plainly correct and the circumstances of this case make it inappropriate for full briefing and argument.

ADDITIONAL STATEMENT OF FACTS

The Statement of the Case in the Jurisdictional Statement of the Appellant omits events subsequent to the February 5, 1979 publication by MITE of its tender offer to the stockholders of Chicago Rivet & Machine Co. ("Chicago Rivet") which have rendered this case moot. Specifically, pursuant to a written

agreement with Chicago Rivet, on February 12, 1979 MITE withdrew its tender offer prior to purchasing any Chicago Rivet stock. That agreement provided in substance that MITE would have the right to investigate the business of Chicago Rivet until March 5, 1979, and, subject to the satisfactory result of that investigation, would commence a new tender offer for Chicago Rivet's stock on or before March 12, 1979. It also provided that if MITE did not commence that new tender offer, MITE would not at any time in the future acquire or make any offer to acquire any stock or assets of Chicago Rivet or otherwise offer to acquire Chicago Rivet.

On March 2, 1979, MITE announced that, based on the results of its investigation of Chicago Rivet, MITE's Board of Directors had unanimously decided against making the new tender offer for Chicago Rivet stock. Since that date, MITE has had no interest or intention to acquire Chicago Rivet by means of a tender offer or otherwise and, as noted, is contractually prohibited from doing so.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited by the Appellant in the Jurisdictional Statement, Section 4(b) of the Illinois Criminal Code of 1961, Ill. Rev. Stat. 1979, ch. 38, § 4-8(b) is pertinent. That statute provides as follows:

§ 4-8. *Ignorance or Mistake*

* * * * *

(b) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(1) The offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or

(2) He acts in reliance upon a statute which later is determined to be invalid; or

(3) He acts in reliance upon an order or opinion of an Illinois Appellate or Supreme Court, or a United States appellate court later overruled or reversed;

(4) He acts in reliance upon an official interpretation of the statute, regulation or order defining the offense, made by a public officer or agency legally authorized to interpret such statute.

ARGUMENT

A. This Case Is Moot and the Appeal Should Be Dismissed.

The exercise of judicial power by this Court under Article III of the Constitution of course depends upon the existence of a case or controversy. To satisfy that requirement, "an actual controversy must be extant at all stages of review. . . ." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). The Court of Appeals in its decision below, noting that MITE had withdrawn its tender offer, raised the question of whether the case was moot. It concluded the case was not for two reasons: (1) the record did not indicate whether MITE intended to make another tender offer for Chicago Rivet's stock and (2) in the event it were to reverse the judgment of the District Court, MITE would face both criminal and civil liability under §§ 137.63-137.65 of the Illinois Business Take-Over Act (the "Illinois Act") for having commenced its tender offer for Chicago Rivet's stock (Appendix, p. 6A).*

The first reason advanced, apparently based upon an application of the "capable of repetition, yet evading review" doctrine enunciated by this Court, under which a case will not be considered moot where a claim abandoned in the course of a litigation "may arise again *with respect to that plaintiff*,"

* The opinion of the Court of Appeals below is reported at 633 F.2d 486.

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980) (emphasis supplied), must reflect the Court of Appeals' lack of knowledge of the facts set forth above concerning the circumstances of MITE's withdrawal of its tender offer for Chicago Rivet stock. In light of those facts, there is no prospect whatsoever of a tender offer by MITE for stock of Chicago Rivet and, accordingly, no grounds for an exception to the doctrine of mootness based on the assumption of the existence of such a prospect.

The second reason advanced by the Court of Appeals, the possibility of criminal or civil liability of MITE for having commenced its tender offer in the event the judgment of the District Court is reversed, is unsound as a matter of law because MITE would have a complete defense to any such attempted criminal prosecution

> "in the rule seldom called into question, and hence infrequently enunciated, that where a criminal statute is first declared to be unconstitutional and later held to be constitutional, a person committing the prohibited act during the interval of time between the two decisions is not liable to indictment."

Wilson v. Goodin, 291 Ky. 144, 163 S.W. 2d 309, 312 (1942). This rule is embodied in the common law, *see, e.g., United States v. Mancuso*, 139 F.2d 90, 91-92 (3d Cir. 1943), *Wilson v. Goodin, supra;* in the Model Penal Code, § 2.04(3)(b) (Proposed Official Draft (1962)); and in the criminal codes of many states, including that of Illinois which provides in pertinent part that a "person's reasonable belief that his conduct does not constitute an offense is a defense if . . . [h]e acts in reliance upon an order or opinion of . . . a United States appellate court later overruled or reversed. . . ." Illinois Rev. Stat. 1979, ch. 38, § 4-8(b). *See People v. Dean*, 73 Ill. App.3d 501, 392 N.E.2d 57 (1979) (upholding a defense based on § 4-8(b)). *See also* 21 C.J.S. *Courts* § 194(a), at 328-29 (1940); W.R. LaFave and A.W. Scott, Jr., Handbook on Criminal Law § 47, at 367 (1972). The court's reasoning in *People v. Dean, supra,*

exemplifies a liberal interpretation of § 4-8(b) and clearly suggests that reliance upon a judgment invalidating a state statute rendered by a trial court, which is subsequently affirmed by an appellate court, would suffice to establish the defense.

The defense, as defined in the Illinois statutes, exists regardless of whether the criminal defendant was a party to the civil litigation in which the statute was adjudged invalid. In addition, leading commentators have suggested that an independant and equally complete defense, based on public policy, should exist where the criminal defendant not only was the plaintiff in that civil litigation, but obtained in it (as MITE did here) an injunction against enforcement of the statute imposing criminal liability. Hall and Seligman, *Mistake of Law and Mens Rea,* 8 U. Chi. L. Rev. 641, 673-74 (1941). *Cf. People v. Dean, supra.*

Whichever theory is adopted, MITE could not be prosecuted successfully for its activities undertaken in reliance upon the judgment below. Based upon analogous reasoning, MITE likewise could not be subjected to any civil penalty for those activities. *See State ex rel. Williams v. Whitman,* 116 Fla. 196, 156 So. 705 (1934) (reversing an administrative penalty based upon a finding of violation of a statute declared unconstitutional in a decision subsequently reversed). Accordingly, this case is moot and the appeal should be dismissed.

B. In the Event the Court Concludes That This Case Is Not Moot, It Should Summarily Affirm the Judgment Below.

In the event this Court concludes that this case is not moot, MITE submits that it should summarily affirm the judgment of the Court of Appeals below because the decision below was plainly correct and the circumstances of this case make it inappropriate for full briefing and argument. That decision clearly and thoroughly discusses the merits of the constitutional questions involved and is consistent with the reasoning and result of the only other Court of Appeals decision on the

merits of the subject of constitutionality of state take-over laws, *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). Therefore, this is not an occasion in which plenary consideration by this Court is necessary to resolve a conflict between the decisions of appellate courts.

Also of pertinence is the fact that the substance of the Federal law applicable to tender offers significantly changed subsequent to the judgment of the District Court below. On December 6, 1979, some nine months after MITE withdrew its tender offer, the Securities and Exchange Commission promulgated extensive new Rules of prospective application governing tender offers which effectively preempt inconsistent state statutes, of which the Illinois Act is one.* A decision of this case would thus not reach the important question of the validity of those new SEC Rules. Moreover, a decision sustaining the validity of those Rules would obviate a decision on the constitutional issues raised in this case. *Cf. Kennecott Corp. v. Smith*, CCH Fed. Sec. L. Rep. ¶ 97,731, at p. 98,838 (3d Cir., December 17, 1980). The Court of Appeals below properly eschewed any decision on the validity of those SEC Rules, since they are inapplicable to this case (see Appendix, pp. 23a-24a n. 25). Consistent with the principle that this Court will not pass upon constitutional issues unnecessarily or in broader terms than are required, *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582, n. 22 (1979), *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947), plenary consideration by this Court of the validity of state take-over statutes should await presentation of the issue in the context of the validity of those SEC Rules.

---

* These Rules appear at 17 C.F.R. § 240.14d-1 *et seq.* (1980).

CONCLUSION

Appellees MITE Corporation and MITE Holdings, Inc. respectfully request that this Court dismiss this appeal or, alternatively, summarily affirm the judgment below of the United States Court of Appeals for the Seventh Circuit.

Dated: February, 1981

Respectfully submitted,

RICHARD W. HULBERT
One State Street Plaza
New York, New York 10004
(212) 344-0600
Counsel for Appellees

CHRISTOPHER H. LUNDING
Of Counsel